ECONOMIC DEVELOPMENT (LOW COST HOUSES) SDN BHD

v.

MAJLIS PERBANDARAN SEBERANG PERAI

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: P-01-231-2010]
22 MAY 2012

CIVIL PROCEDURE: *Specific performance - Transfer of land - Land development - Condition to surrender land - Whether condition ultra vires - Town and Country Planning Act 1976, ss. 22(1) and 22(5)(h) - Public amenities on plot of land - Whether structures on plot illegal - Whether specific performance should have been refused*

LAND LAW: *Recovery of land - Whether action statute barred - Whether appellant's conduct constituted acknowledgement of respondent's rights over land - Limitation Act 1953, ss. 9(1), 26(1)(a)*

LIMITATION: *Land, recovery of - Whether action statute-barred - Commencement of limitation period - Land recovery action - Limitation Act 1953, s. 26(1)(a)*

This was an appeal by the appellant ('the defendant') against the High Court's decision in allowing the respondent's ('the plaintiff') claim and ordering specific performance, directing the defendant to transfer a certain plot of land. In seeking permission to develop an area known as Taman Senangan, the defendant had applied and submitted necessary layout plans to the plaintiff, the local planning authority of Seberang Perai. The plans were approved and the plaintiff imposed a condition requiring the defendant to surrender a one acre space ('the plot') to the plaintiff for a nominal consideration of RM1 ('the condition'). In 1997, the defendant prepared the necessary documents to transfer the plot to the plaintiff. However, the documents were returned to the defendant twice as they contained errors and the transfer could not take effect. On 3 November 2006, the plaintiff's solicitors issued a notice, demanding the defendant to forward the documents but the latter failed to comply with the notice.

Subsequently, the plaintiff sought and successfully obtained specific performance compelling the defendant to transfer the plot. Hence, the defendant appealed. Before the court, the issues that arose for determination were: (i) whether the plaintiff's originating summons was statute barred; (ii) whether the plaintiff's acceptance of the defendant's payment for the plot's quit rent precluded the plaintiff's originating summons for specific performance; (iii) whether the condition was *ultra vires*; and (iv) whether specific performance should have been refused because there were illegal structures on the plot.

Held (dismissing appeal with costs)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The plaintiff's originating summons was an action for recovery of land. Section 9(1) of the Limitation Act 1953 ('the Act') provides that the limitation period for an action for recovery of land shall be 12 years. The defendant's solicitors had written to the plaintiff, acknowledging the plaintiff's rights over the plot. The defendant's solicitors had forwarded the erroneous documents to the plaintiff's solicitors to effect the transfer of the plot to the plaintiff. The defendant's conduct clearly constituted an acknowledgement of the plaintiff's rights over the plot. Section 26(1)(a) of the Act provides that where there is an acknowledgement (by the defendant in the instant appeal) in 1997, the limitation period would start from 1997 and end in 2009. Hence, the plaintiff's originating summons which commenced in 2007 was clearly within the 12-year limitation period. There was no necessity to consider the notice of demand issued by the plaintiff's solicitors in 2006. (paras 12 & 13)

(2) The decree of specific performance had been correctly granted against the defendant. Payment of the quit rent was made to the land office and not to the plaintiff. The plaintiff being the local planning authority, did not have the power or the jurisdiction to collect the quit rent. The defendant's own documents clearly showed that the defendant had been paying the quit rent to the land office. The defendant knew very well that the plot was meant to be transferred to the plaintiff. The defendant's mere act of paying the quit rent to the land office did not *ipso facto* affect the plaintiff's right to the plot. (paras 16, 18 & 19)

(3) The condition was not *ultra vires*. The importance of providing for open spaces in the development project for the benefit of the general public could not be denied and had indeed been affirmed in s. 22(1) and s. 22(5)(h) of the Town and Country Planning Act 1976. The open space had been laid out or reserved for laying out wholly or partly as a public garden, park, sports and recreational ground, pleasure ground, walk or as a public place. (paras 25 & 26)

(4) The presence or absence of any structure(s) on the plot was irrelevant. The building on the land was public amenities which was completely compatible with the use of the plot as a public open space. (paras 29 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu ('defendan') terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden ('plaintif') dan memerintahkan pelaksanaan spesifik, mengarahkan defendan untuk memindahkan suatu plot tanah. Bagi mendapatkan kebenaran untuk membangunkan sebuah kawasan yang dikenali sebagai Taman Senangan, defendan telah memohon dan mengemukakan pelan susun atur yang perlu kepada plaintif, pihak berkuasa perancangan tempatan Seberang Perai. Pelan-pelan telah diluluskan dan plaintif mengenakan syarat yang menghendaki defendan untuk menyerahkan ruang sebanyak satu ekar ('plot') kepada plaintif dengan pertimbangan nominal RM1 ('syarat'). Pada tahun 1997, defendan telah menyediakan dokumen-dokumen yang perlu untuk memindahkan plot tersebut kepada plaintif. Walau bagaimanapun, dokumen-dokumen tersebut dikembalikan kepada defendan sebanyak dua kali kerana terdapat kesilapan dan pindah milik tersebut tidak dapat dikuatkuasakan. Pada 3 November 2006, peguamcara plaintif telah mengeluarkan notis, menuntut defendan untuk mengemukakan dokumen-dokumen tetapi defendan gagal mematuhi notis tersebut. Kemudian, plaintif memohon dan berjaya memperolehi pelaksanaan spesifik terhadap defendan untuk memindahkan plot tersebut. Oleh itu, defendan merayu. Di hadapan mahkamah, isu-isu yang timbul untuk diputuskan adalah: (i) sama ada saman pemula plaintif dihadkan masa; (ii) sama ada penerimaan plaintif bagi pembayaran cukai tanah oleh defendan menghalang pelaksanaan spesifik plaintif ke atas saman pemula plaintif; (iii) sama ada syarat tersebut adalah *ultra vires*; dan (iv) sama ada pelaksanaan spesifik sepatutnya tidak dibenarkan kerana terdapat struktur haram di atas plot.

Diputuskan (menolak rayuan dengan kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Saman pemula plaintif adalah suatu tindakan untuk mendapatkan semula tanah. Seksyen 9(1) Akta Had Masa 1953 ('Akta') memperuntukkan bahawa tempoh had masa bagi tindakan untuk mendapatkan semula tanah adalah 12 tahun. Peguamcara defendan telah menulis kepada plaintif, mengakui hak-hak plaintif ke atas plot tersebut. Peguamcara defendan telah mengemukakan dokumen-dokumen yang mengandungi kesilapan kepada peguamcara plaintif untuk melaksanakan pindah milik plot kepada plaintif. Tindakan defendan jelas merupakan perakuan hak-hak plaintif ke atas plot tersebut. Seksyen 26(1)(a) Akta memperuntukkan bahawa apabila terdapat perakuan (oleh defendan dalam rayuan ini) pada tahun 1997, tempoh had masa akan bermula dari tahun 1997 dan berakhir pada tahun 2009. Oleh itu, saman pemula plaintif yang bermula pada tahun 2007 adalah jelas dalam tempoh had masa 12 tahun. Tiada keperluan untuk mempertimbangkan notis tuntutan yang dikeluarkan oleh peguamcara plaintif pada tahun 2006.

(2) Dekri pelaksanaan spesifik telah dengan betul diberikan terhadap defendan. Pembayaran cukai tanah telah dibuat kepada pejabat tanah dan bukan kepada plaintif. Plaintif, sebagai pihak berkuasa perancangan tempatan, tidak mempunyai kuasa atau bidang kuasa untuk memungut cukai tanah. Dokumen defendan dengan sendirinya jelas menunjukkan bahawa defendan telah membayar cukai tanah di pejabat tanah. Defendan mengetahui bahawa plot tersebut bertujuan untuk dipindah milik kepada plaintif. Tindakan defendan membayar cukai tanah di pejabat tanah kebiasannya tidak menjejaskan hak plaintif ke atas plot tersebut.

(3) Syarat tersebut tidak *ultra vires*. Kepentingan menyediakan ruang terbuka dalam projek pembangunan untuk faedah masyarakat umum tidak boleh dinafikan dan ini sememangnya telah ditegaskan dalam s. 22(1) dan s. 22(5)(h) Akta Perancangan Bandar dan Desa 1976. Ruang terbuka telah disusun atur atau dirizabkan untuk disusun atur secara keseluruhannya atau sebahagiannya sebagai taman awam, sukan dan tempat rekreasi, tempat riadah, berjalan atau sebagai suatu tempat awam.

(4) Kehadiran atau ketiadaan mana-mana struktur di atas plot tersebut adalah tidak relevan. Bangunan di atas tanah tersebut adalah kemudahan awam yang amat sesuai dengan penggunaan plot sebagai ruang awam terbuka.

Case(s) referred to:
Fawcett Properties Ltd v. Buckingham County Council [1960] 3 All ER 503 HL ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 9(1), 26(1)(a)
Town and Country Planning Act 1976, ss. 2, 22(1), 22(5)(h)

Town and Country Planning Act 1947, s. 14(1) [UK]

For the appellant - Romesh Abraham (Jason Gopal with him); M/s Shook Lin & Bok
For the respondent - Kanesh Sundrum; M/s Kanesh Sundrum & Co

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-529-2007]

Reported by Najib Tamby

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This is the appeal by the appellant (defendant) against the decision of the learned High Court Judge who had allowed the respondent's (plaintiff's) claim and ordered specific performance directing the defendant to transfer the land known as Lot 4319, GRN 100974, Mukim 7, Daerah Seberang Perai Utara, Pulau Pinang (the plot) to the plaintiff.

Factual Background

[2] The plaintiff's originating summons (OS) and the affidavits in support reveal that the plaintiff is the Local Planning Authority for the area of Seberang Perai.

[3] The defendant applied and submitted the necessary layout plans to the plaintiff for planning permission to develop an area known as Taman Senangan.

[4] The plaintiff approved the plans and imposed a condition, *inter alia*, requiring the defendant to surrender the plot to the plaintiff for a nominal consideration of RM1 (the condition). The defendant accepted the condition by signing and returning a copy of the approved plans to the plaintiff. The plot is an open space with an area of about one acre.

[5] In 1997, the defendant prepared the necessary documents to transfer the plot to the plaintiff. However, these transfer documents contained errors and the transfer could not be effected. The plaintiff had to return the documents twice to the defendant's solicitors for rectification, but there was no further action and the transfer did not take place.

[6] On 3 November 2006, the plaintiff's solicitors issued a notice of demand to the defendant requiring the defendant to forward the documents to the plaintiff.

[7] Upon the defendant's failure to comply with the notice of demand, the plaintiff sought and obtained specific performance to compel the defendant to transfer the plot to the plaintiff.

[8] Hence, this appeal by the defendant.

Limitation

[9] The defendant's learned counsel Mr Romesh Abraham (assisted by Mr Jason Gopal) submitted that the plaintiff's claim is based on contract and so the six-year limitation period applies, in which case, time began to run from 1992 so that the plaintiff's OS filed in 2007 is statute barred.

[10] Learned counsel Mr Kanesh Sundrum contended for the plaintiff that the plaintiff's OS is not statute barred as the plaintiff's claim is for recovery of land and so the limitation period is 12 years. He stressed that in 1997, there was an acknowledgement by the defendant's solicitors of the plaintiff's rights over the plot. Further, there was the notice of demand issued by the plaintiff's solicitors in 2006.

[11] Under this head we identify the question for consideration as follows:

> Is the plaintiff's OS aimed at the recovery of land (ie, the plot) so that the limitation period is 12 years?

[12] We are of the view that the plaintiff's OS is an action for recovery of land. Section 9(1) of the Limitation Act 1953 provides that the limitation period for an action for recovery of land shall be 12 years. (A reference hereinafter to a section is a reference to that section in the Limitation Act 1953).

[13] In relation to the defendant's argument that the six-year limitation period had triggered in 1992 and not 1997, we note that the defendant's solicitors had written to the plaintiff acknowledging the plaintiff's rights over the plot. The defendant's solicitors had forwarded the documents (with errors) to the plaintiff's solicitors to effect the transfer of the plot to the plaintiff. The defendant's conduct clearly constituted an acknowledgement of the plaintiff's rights over the plot. Section 26(1)(a) provides that where there is an acknowledgement (by the defendant in the instant appeal) in 1997, the limitation period would start from 1997 and end in 2009. Hence, the plaintiff's OS commenced in 2007 is clearly within the 12-year limitation period. There is therefore no necessity for us to consider the notice of demand issued by the plaintiff's solicitors in 2006.

[14] The judgment of the Federal Court delivered by Gill FJ (later CJ(M)) in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 FC at p. 33 H-I rt column made it clear that whether the action is for specific performance or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

[15] Our answer to the above question is in the affirmative.

Defendant's Payment Of Quit Rent

[16] The defendant relied on its payment of the quit rent for the plot and argued that the plaintiff's acceptance of such payment precluded the plaintiff's OS for specific performance.

[17] The plaintiff submitted that this argument is totally misconceived and wrong.

[18] With the utmost respect to the defendant's learned counsel, it is necessary for us to point out that the quit rent was paid to the land office and not the plaintiff. The plaintiff being the Local Planning Authority does not have the power or jurisdiction to collect the quit rent. The defendant's own documents clearly show that the defendant had been paying the quit rent to the land office.

[19] The defendant's submission on this issue is perplexing. The defendant knew very well that the plot was meant to be transferred to the plaintiff. The defendant's mere act of paying the quit rent to the land office does not *ipso facto* affect the plaintiff's right to the plot. Consequently, the decree of specific performance has been correctly granted against the defendant.

Was The Condition *Ultra Vires*?

[20] The defendant argued that the condition was *ultra vires* and so specific performance should not be granted against it.

[21] The plaintiff responded that the condition is valid under s. 22(1) and s. 22(5)(h) of the Town and Country Planning Act 1976 (s. 22(1) and s. 22(5)(h)) and therefore valid.

[22] Section 22(1) and s. 22(5)(h) provide for the treatment of an application for planning, and the conditions which may be imposed by the plaintiff as the Local Planning Authority. The relevant portions of s. 22(1) and s. 22(5)(h) read as follows:

> **22. Treatment of applications**
>
> (1) As soon as possible after the receipt of an application for planning permission, … the local planning authority shall decide on the application for planning permission.
>
> …
>
> (5) Conditions imposed under subsection (3) may include any or all of the following conditions, that is to say, conditions:
>
> (h) for securing the making up of open spaces in accordance with the approved layout plans.

[23] Section 22(1) and s. 22(5)(h) expressly provide for the imposition of a condition pertaining to open spaces in accordance with the approved layout plans for the development of the land.

[24] By way of analogy, in *Fawcett Properties Ltd v. Buckingham County Council* [1960] 3 All ER 503 HL, the issue concerned the validity of a condition which the respondent (Birmingham County Council) as the local planning authority, in exercise of powers conferred on it by s. 14(1) of the Town and Country Planning Act 1947, imposed on the appellant (Fawcett Properties Ltd) when granting planning permission for the development of two farm worker's cottages. The condition was that the occupation of the cottage was to be limited to persons employed in agriculture or in forestry. This condition was challenged as *ultra vires*. Lord Denning spoke in the House of Lords and held that:

> When planning conditions are made, as here, so as to maintain the green belt against those who would invade it, they ought to be supported if possible. And credit ought to be given to those who have to administer them, that they will be reasonably administered …

[25] In the instant appeal, the importance of providing for "open spaces" in the development project for the benefit of the general public cannot be denied and has indeed been affirmed in s. 22(1) and s. 22(5)(h). The open space has been laid out or reserved for laying out wholly or partly as a public garden, park, sports and recreational ground, pleasure ground, walk or as a public place: s. 2 of the same Act.

[26] We therefore hold that the condition is not *ultra vires*.

Structures On The Plot

[27] The defendant finally maintained that there are illegal structures on the plot and so specific performance should have been refused.

[28] The plaintiff took the position that the main issue here is whether the defendant should transfer the plot to the plaintiff pursuant to the condition.

[29] In our view, the presence or absence of any structure(s) on the plot is irrelevant. In any event, the pictures tendered by the defendant at pp. 122 to 124 of the Appeal Record clearly show

A that the building is called "Dewan Orang Ramai Taman Senangan" ie, a Public Hall in Taman Senangan. The amenities that can be seen in the pictures are public amenities which are completely compatible with the use of the plot as a public open space.

B **[30]** We are of the view that the defendant's contention is wholly without merits.

Conclusion

[31] On the foregoing grounds, we dismiss this appeal with costs C of RM10,000 and affirm the decision of the High Court.

[32] Deposit to the plaintiff (respondent) on account of the fixed costs.

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